

The Akron Paint and Varnish Company and Frank T. Simon. Case 8-CA-20959

September 26, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 19, 1991, Administrative Law Judge Irwin H. Socoloff issued the attached supplemental decision.¹ The Respondent filed exceptions and a supporting brief and the General Counsel filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Akron Paint and Varnish Company, Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The original Decision and Order is reported at 293 NLRB 781 (1989). On December 1, 1989, the Sixth Circuit granted enforcement of the Board's Order, *enfd. mem.* 890 F.2d 416.

Victoria Belfiglio, Esq., for the General Counsel.
H. Brian Rector, of Akron, Ohio, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On April 24, 1989, the Board issued its Decision and Order (293 NLRB 781) in the above-entitled proceeding, directing Respondent, *inter alia*, to take certain affirmative action to remedy the unfair labor practices therein found, including the reinstatement of Frank T. Simon and payment to him of backpay. Thereafter, on December 1, 1989, the United States Court of Appeals for the Sixth Circuit entered its judgment enforcing the Board's Order (No. 89-6082). The present controversy concerns the amount of backpay due to Simon under the terms of the Order.

Pursuant to notice, hearing in this matter was held before me in Akron, Ohio, on October 17, 1990, and in Cleveland, Ohio, on February 20, 1991, at which the General Counsel and the Respondent were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the General Counsel filed a brief which has been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS AND CONCLUSIONS

The General Counsel's compliance specification seeks, *inter alia*, recovery of wages lost by Simon, at straight time plus overtime, for the period April 1, 1988, the date of discharge, to June 12, 1990, when he was reinstated to his former position.¹ As issued on July 27, 1990, the specification contains calculations showing a net backpay obligation to Simon of \$48,519, plus interest to the date of payment.

Respondent, essentially, has raised two objections to the General Counsel's manner of calculation. First, it claims that the specification does not reflect fully the amount of interim earnings enjoyed by Simon during the backpay period. Second, Respondent urges that, throughout the backpay period, Simon, had he remained employed by Respondent, would have worked fewer overtime hours than the number of such hours assigned in the specification and used to calculate net backpay.

With respect to the first matter, the General Counsel, at trial, introduced a revised backpay specification summary reflecting additional interim earnings by Simon of \$1178 for the third quarter of 1989. Region 8 Compliance Officer Normand Richard, who prepared the initial summary, and the revised one, testified that that amount had been reported, previously, by Simon, but had been overlooked by Richard when he prepared the initial summary. This addition to interim earnings for the third quarter of 1989, reduces the claimed backpay obligation owed to Simon to \$47,341, plus interest. Respondent, at trial, offered no evidence of any interim earnings by Simon in addition to that reflected in the revised summary. Accordingly, those figures must be accepted as accurate.

As to the calculation of overtime hours, Richard testified that, in preparing his estimate of Simon's gross backpay for the April 1, 1988, to June 12, 1990 period, he reviewed the pay records for Simon, before and after the backpay period, and those of Tim Sanders and Virgil Foster, Respondent's other employees who, like Simon, were classified as master paintmakers. Richard arrived at the number of overtime hours that Simon would have worked during the backpay period, some 10 hours per week, by adding the overtime hours actually worked by Sanders and Foster, on a quarterly basis, and dividing by 2. In Respondent's view, this method of calculation produced an inflated result since, Respondent argues, had Simon remained employed during the backpay period, the total number of overtime hours available to master paintmakers would have remained constant, and would have been divided among Sanders, Foster, and Simon. In other words, the same number of hours actually worked by Sanders and Foster would have been divided among the three master paintmakers.

Richard testified that he chose the method of calculation which he did because his review of Respondent's records showed that, prior to the backpay period, Sanders, Foster, and Simon all worked approximately 10 hours of overtime per week and, during the backpay period, Sanders and Foster continued to work the same number of overtime hours. Thus, the termination of Simon did not result in an increase in the number of overtime hours worked by Sanders and Foster.

¹ Following reinstatement, Simon worked for 4 days and, then, voluntarily quit his employment.

Documentary evidence, prepared from Respondent's payroll records, support these assertions.

Simon, in his testimony, stated that, prior to his discharge, he, Sanders, and Foster each worked approximately 50 hours per week, accumulating about 1 hour of overtime per weekday, and 4 to 5 hours of overtime every Saturday. This pattern continued for the brief period of Simon's employment following his reinstatement.

As the uncontradicted record evidence shows that the estimate of overtime hours that Simon would have worked during the backpay period, as contained in the specification, was appropriate and reasonable under the circumstances, it was properly relied upon in calculating the gross backpay due to Simon. I so find and conclude.

ORDER

The Respondent, The Akron Paint and Varnish Company, Akron, Ohio, its officers, agents, successors, and assigns, shall pay backpay to Frank T. Simon in the amount of \$47,341, together with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*,² less tax withholding required by Federal and state laws.

² 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 Amendment to 26 U.S.C. § 6621.